IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.3123 OF 1987

Century Enka Ltd. ....Petitioner

V/s.

Shri S.K. Pathak
1st Income Tax Officer
T.D.S. Circle, Bombay & Ors. ....Respondents

Mr.H. Toor with Mr.S.R. Balkrishnan i/b M/s.Crawford Bayley & Co. for the Petitioner.

Mr.R.V. Desai with Mr.A. Ashokan for the Respondent.

CORAM : A.P. SHAH AND
S.J. VAZIFDAR, JJ.
DATED : 4TH MARCH, 2005.

P.C. :

. The Petitioner is the registered Company engaged in the manufacture of polyester and nylon textile yarn and nylon tyre cord fabric. In or about 1984 the Petitioner entered into and executed agreements with the foreign companies for supply of machinery and equipment to the Petitioner. The foreign companies offered to guarantee performance of supplied equipment and machinery only if the said equipment and machinery was installed by technicians provided by the foreign companies. Therefore, the

Petitioner entered into and executed further agreements with the foreign companies for procuring the services of the technicians in the employment of the foreign companies. The said agreements provide inter-alia that the foreign companies shall second technicians out of their employees to the Petitioner, the foreign companies would not receive any consideration for seconding their technicians to the Petitioner, the seconded technicians would continue to remain employees of the foreign companies and would not be or become employees of the Petitioner and the foreign companies were not engaged and would not engage in any trade or business in India till the seconded technicians completed their contractual job. The Reserve Bank of India on the application of the Petitioner granted permission to the Petitioner to engage the services of the seconded technicians and to apply for remittance of service fee abroad to the seconded technicians by producing (a) invoice received from the foreign companies, (b) tax exemption/clearance/NOC from the Income Tax Department in India in respect of the remittance.

2. Pursuant to the permission granted by the Reserve Bank of India, the Petitioner applied to the second Respondent that income earned by the seconded

technicians (in previous years ending on 31.3.1986 and 31.3.1987 relevant to Assessment Years 1986-87 and 1987-88) was exempted from income tax under section 10 (6) (vi) of Income Tax Act, 1961 and requested the second Respondent to issue a "No Objection Certificate" to the Petitioner for submission before the Reserve Bank of India to enable the Petitioner to remit service fee abroad to the seconded technicians. The Petitioner also filed on 7th May, 1987 returns of income as agent of the seconded technicians (for Assessment Years 1986-87 and 1987-88) returning an income of 'NIL', as income earned by the seconded technicians (in previous years ending on 31.3.1986 and 31.3.1987 relevant to Assessment Years 1986-87 and 1987-88) was exempted from income tax under Section 10(6)(vi) of Income Tax Act, 1961. Respondent No.1 by two separate orders dated 14th August, 1987 for the assessment years 1986-87 and 1987-88 held that (i) the seconded technicians were employees of the Petitioner, (ii) the provisions of Section 10(6)(vi) of Income Tax Act, 1961 therefore were not applicable to the seconded technicians and (iii) the provisions of Section 192 of Income Tax Act, 1961 were applicable to the Petitioner and income tax should have been deducted at source out of salaries paid to the seconded technicians and deposited and which tax the

Petitioner had failed to deduct as prescribed under Section 192 of Income Tax Act, 1961. Respondent No.1 therefore held that under Section 201(1) read with 192(1) of Income Tax Act, 1961 that there was short deduction (failure to deduct) by the Petitioner. Based on the said orders demand notices came to be issued to the Petitioner which are challenged in the present Petition. The Division Bench granted interim stay to order of demand subject to furnishing a bank guarantee of Rs.24.00 lacs to the Prothonotary & Senior Master.

3. As stated earlier,the Petitioner had filed the returns of income as agent of the seconded technicians for the assessment years 1986-87 and 1987-88 and in those returns, Income Tax Appellate Tribunal finally held that the income earned by seconded technicians was exempted under Section 10(6)(vi) of Income Tax Act, 1961. The Income Tax Department filed reference application to the Income Tax Appellate Tribunal under Section 256(1) of the Income Tax Act, 1961, but this reference was also rejected and thus the order of the Income Tax Appellate Tribunal has attained finality. In view of the categorical findings by the Income Tax Appellate Tribunal that the seconded technicians were not the

employees of the Petitioner and there were the employees of the foreign companies and also the finding that the Petitioner is entitled to claim exemption under Section 10(6)(vi) of the Income Tax Act, 1961 the impugned orders passed by Respondent No.1 treating the Petitioner as defaulter cannot sustained and the same are hereby quashed and set-aside. Rule is accordingly made absolute. The bank guarantee to stand discharged.